84-551 (4)

No. 551

Office - Supreme Court, U.S.
FILED
NOV 1 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, *et al.*,

Petitioners,

vs.

FIRST PRESBYTERIAN CHURCH OF SCHENECTADY, *et al.*,

Respondents.

CONSENT TO FILING OF *AMICUS CURIAE* BRIEF
and
BRIEF OF *AMICUS CURIAE*
IN SUPPORT OF REVERSAL

MICHAEL I. SMITH*
1730 "K" Street
Washington, D.C. 20006
(202) 331-8550

Of Counsel:
FREEDMAN, LEVY, KROLL & SIMONDS

WILLIAM J. O'SHEA
598 Madison Avenue
New York, New York 10022
(212) 752-6442
Attorney for Amicus Curiae

*Counsel of Record

CONSENT TO FILING OF BRIEF *AMICUS CURIAE*

Pursuant to the provisions of Rule 36, *amicus curiae* William C. Brownson submits this brief with the consent of counsel for Petitioners and Respondents herein.

TABLE OF CONTENTS

Page

CONSENT TO FILING OF BRIEF *AMICUS CURIAE* .....

TABLE OF CONTENTS .....

TABLE OF AUTHORITIES .....

JURISDICTION .....

THE STATUS OF *AMICUS CURIAE* .....

THE OPINION BELOW .....

QUESTIONS PRESENTED .....

CONSTITUTIONAL PROVISIONS INVOLVED .

STATEMENT OF THE CASE .....

ARGUMENT I
THE DECISION OF THE COURT OF APPEALS VIOLATES FIRST AMENDMENT REQUIREMENTS .....

ARGUMENT II
EQUAL PROTECTION OF THE LAW IS DENIED BY THE DECISION OF THE NEW YORK COURT .....

CONCLUSION .....

TABLE OF AUTHORITIES

Cases	Page
Jones v. Wolf, 443 U.S. 595 (1979)	
Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952)	
Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960)	
Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969)	
Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)	
Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872)	

No. 551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, *et al.*,

Petitioners,

vs.

FIRST PRESBYTERIAN CHURCH OF SCHENECTADY, *et al.*,

Respondents.

CONSENT TO FILING OF *AMICUS CURIAE* BRIEF

THE STATUS OF *AMICUS CURIAE*

William C. Brownson, the *amicus curiae* who files this brief in support of Petitioners herein, is President of the General Synod of the Reformed Church in America ("RCA"). As President, he is Chief Executive Officer of the General Synod of the RCA.

The General Synod of the RCA is the highest assembly and judicatory of the Reformed Church in America which consists of 943 local congregations with a combined membership of 353,184.

The Reformed Church in America is a continuation in the United States of the Dutch Reformed Church, which was the official state church of Holland. In the early years of the United

States, it was known as the Reformed Protestant Dutch Church of North America. In 1819 it changed its name to Reformed Dutch Church and in 1867 to the Reformed Church in America, its present name.

Based on a system of representation, the Reformed Church in America, very much like the petitioner United Presbyterian Church, operates at four levels of ecclesiastical authority:

(1) The Consistory, which is the governing body of a local church;

(2) The Classis, which is comprised of member ministers and an elder(s) from each local church;

(3) The Particular Synod, to which the Classis sends delegates; and

(4) The general Synod, which is the final ecclesiastical and appellate authority and to which each Classis sends delegates.

At the present time there are forty-five (45) Classes and six (6) Particular Synods which exercise authority in the United States and Canada.

Amicus Curiae considers the issues presented by this case to be of critical importance to his church and to all other churches whose governmental structures have been defined by this Court and other courts of inferior jurisdiction as "hierarchical churches". *Amicus Curiae* believes the decision of the Court of Appeals of the State of New York in the instant case offends the Constitution of the United States as interpreted by the decisions of this Court, and therefore the decision of the court below should be reversed.

THE OPINION BELOW

The opinion of the Court of Appeals of the State of New York is printed in the Appendix to the Petition at A-1 and is reported at 62 N.Y.2d 110, 476 N.Y.S.2d 86, and 464 N.E.2d 454. The Order of the Court of Appeals of New York denying rehearing, (App. A-41) is not reported.

JURISDICTION

On May 15, 1984, the judgment of the Court of Appeals of New York was entered. The Order of the Court of Appeals of New York denying a timely petition for rehearing was entered on July 5, 1984. The jurisdiction of this court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Do the provisions of the First and Fourteenth Amendments of the United States Constitution, as interpreted by this Court in *Jones v. Wolf*, 443 U.S. 595 (1979) and earlier in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) and *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) prohibit civil courts from enjoining duly constituted ecclesiastical bodies from exercising powers expressly given to them under the constitutions of said denominations on the issue of governance of congregations and use of real property within which said congregations exercise their worship?

2. Do the First and Fourteenth Amendments require that the protection of law be applied equally among hierarchical religious denominations to decide for themselves, free from state interference, matters of church governance as well as those of faith and doctrine? *Serbian Eastern Orthodox Diocese v. Milivojevich* 424 U.S. at 721-722.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...

U.S. Const. Amend. XIV, Sec. 1:

> "... nor should any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The issue before the courts of the State of New York was whether the congregation of a local Presbyterian church could unilaterally, and without permission of its religious superiors, withdraw for doctrinal reasons, from the denomination and concommitantly, prohibit the denominational hierarchy from interfering with the continued use and enjoyment of the church property. In short, whether a local church could, utilizing the offices of the civil judiciary, create and maintain a schismatic situation notwithstanding procedures for review and redress of denominational questions contained in the denomination's governing instrument.

The Court of Appeals has sustained the decision of the court *nisi prius* which denied the right of a civil court to intervene in matters of religious polity and governance and yet would preserve to such schismatic congregation, *in futuro*, title to its real property and assets through the issuance of a permanent injunction against its religious hierarchical superiors. Thus, the decision of the New York Court leaves the petitioners with the possibility of a Phyrric victory whereunder the local church could be found to be in violation of the provisions of the "Book of Order" constituting the denomination's governing instrument and yet remain free, as a separate church, to hold title to church property and dispose of the same at will.

Respondent, the First Presbyterian Church of Schenectady ("First Church") was organized in 1760 and has been a particular church of the United Presbyterian Church since at least 1770. During this entire period it has been subject to the jurisdiction and governance of the Presbytery of Albany and its predecessor presbyteries. First Church, on January 24th 1977, voted to "sever" or withdraw from the Presbytery of Albany and to maintain control and ownership of the real property and assets underlying the church. This unilateral action occurred by virtue of philosophical discontent on the part of the local church, which first arose in 1976, out of the denomination's support of positions and activities considered violative of fundamental belief and principles of Presbyterianism by the local church. First Church, in that instance, followed the denominational

rules of governance and petitioned the Presbytery of Albany to be dismissed to another denomination. Following ecclesiastical due process that petition was denied in March of 1976 and thereafter, again pursuant to the provisions of the Book of Order, petitioner Presbytery established an administrative commission to investigate conditions at First Church.

Immediately prior to the rendering of a decision by the investigative commission on February 1, 1977, the action by First Church of January 24, 1977 was taken. The administrative comissions report and recommendations were that First Church's governing body be supplanted and the petitioner Presbytery thereafter directed the governing body of the First Church to cease action until directed otherwise and in furtherance of its mandate established a further administrative commission giving to it, again pursuant to established procedure, all the powers of the now supplanted First Church.

In direct violation of the provisions of the Presbyterian constitution, the "Book of Order", providing for appellate review within the hierarchical structure, respondents sought a declaratory action by a District Court of the United States. Such relief was denied as being violative of the Constitutional provisions before this Court and thereafter respondents initiated an action in the courts of the State of New York resulting in the decision of the Court of Appeals of the State of New York sought to be reviewed herein.

ARGUMENT

POINT I

THE DECISION OF THE COURT OF APPEALS VIOLATES FIRST AMENDMENT REQURIEMENTS

By treating a serious philosophical dispute between a local church and its hierarchical judicatories as one merely involving title to real estate, the Court of Appeals has in effect, permitted a local church to establish itself as a separate ecclesiastical institution, notwithstanding over 200 years of prior acquiesence in Presbyterian denominational control. Thus, by granting a permanent injunction against an appellate judicatory,

here the Presbytery of Albany, from interfering with title, ownership or use of the local church, the New York Court of Appeals has in effect emasculated petitioners' form of governance. For two centuries, the respondent First Church adopted and acquiesed in the forms of governance by the hierarchical denomination involving allegiance through the Presbytery, Synod and General Assembly. As a Presbyterian church it acknowledged governance through the Book of Order and its contents. Even as late as 1976 when, apparently disturbed by what it felt to be a divergence from Presbyterian tenets and heritage, First Church sought relief through petition to the Presbytery in accordance with the provisions of the Book of Order. Following the provisions of said Book of Order, the Presbytery of Albany, being the next appellate judicatory, formed a commission with powers to investigate the allegations of the session and to advise the Presbytery as to appropriate action to be taken.

One can only assume, from the timing of the motion to "sever", less than one week prior to the publication of the commission's findings and report, that the local church, respondent herein, chose at that point to become schismatic and to break away from its heritage.

The concept of ecclesiastical governance and jurisdiction has long been recognized as inviolate by this Court, for in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. at 724:

> In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

In the instant case, the Presbytery of Albany, acting on the report of its commission, both bodies constituting institutions whose existence, character or judicial qualifications have never been questioned by respondents herein duly found that the local church was in violation of Presbyterian tenets and good order. The Court of Appeals of the State of New York ignores such finding of a duly constituted ecclesiastical judicatory and seizes upon the misapplication of the "neutral principles of law" theory to establish the respondent church independent of its Presbyterial hierarchy.

As was noted by Mr. Justice Powell in his dissent in *Jones v. Wolf*, 443 U.S. at 613:

> The Georgia [here New York] courts as a matter of state law, granted control to the schismatic faction, and thereby effectively reversed the doctrinal decision of the church courts. This indirect interference of the civil courts with the resolution of religious disputes within the church is no less proscribed by the First Amendment than is the direct decision of questions of doctrine and practice.

In the instant case the decision of the Court of Appeals forestalls an effective review of the matter by the appellate judicatories of the Presbyterian church and thus thwarts such religious polity.

II. EQUAL PROTECTION OF THE LAW IS DENIED BY THE DECISION OF THE NEW YORK COURT

"What is at stake here is the power to exercise religious authority. That is the essence of this controversy." Writing for himself and Justices Black and Douglas, the late Justice Frankfurter so commented in his concurring opinion in the case of *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. at 121. Somewhat later in his opinion he notes, at page 123, and we paraphrase,

> a legislature [here Court] is not free to vest in a schismatic head the means of acting under the authority of his old church, by affording him the

> religious power which the use and occupancy of St. Nicholas Cathedral [here First Church] make possible.

The issue before this Court is not that of title to land but the right of an ecclesiastical entity to govern its subordinates and by virtue of its right of governance therefore its right to control the use of religious edifices.

The question of right to use assets of religious institutions flows naturally as a result of schismatic discord, for no one side will freely leave the walls from which it preaches. Issues as to which ecclesiastical entity was entitled, by virtue of legitimate governance, to the use and occupancy of real property in the State of New York have twice come before this Court in *Kedroff v. Saint Nicholas Cathedral, id* at 95, and *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960). This Court in both instances reversed the decisions of the Court of Appeals in New York, ruling that the State may not, by legislation or by common law decision, transfer hierarchical control of a denomination and the attendant control over church property from one group to another. Similarly, this Court's decision in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. at 724-725, reversed the holding of the Supreme Court of Illinois, finding that the latter had unconstitutionally substituted its own interpretation of the denomination's constitution and polity for the interpretation of the ecclesiastical tribunals.

It is respectfully submitted that no clearer corollary exists than is present here, where the Presbytery of Albany replaced the Session of the First Church. In other words, is the authority of the Presbytery of Albany any less valid and recognizable by this Court than the ecclesiastical authority of the Holy Assembly of Bishops and Holy Synod in *Serbian* and that of the Moscow Patriarch in *Kedroff* and *Kreschik*? As the majority of the *Kedroff* Court noted, citing the New York Court, "There is no problem of title. It is in the appellee corporation. The issue is right of use." 344 U.S. at 96 n.1 (1952). Here too, the Presbytery has, by virtue of the Book of Order, the ecclesiastical power to ordain the use of the property.

It is respectfully submitted that the Court of Appeals by straining to find a pure question of *title* to real estate has sought to escape the issue of "use" and compliance with the rule of "deference" first established in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872) wherein this Court held that:

> whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them on their application to the case before them. *Id.* at 727.

This Court found in its ruling in *Kedroff*, 344 U.S. at 120-121:

> There are occasions when civil courts must draw lines between the responsibility of church and state for the disposition or use of property. Even in those cases when the property right follows as an incident from decisions of the church customs or law on ecclesiastical issues, the church rule controls.

See also *Jones v. Wolf*, 443 U.S. 595 (1979), *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445-449 (1969).

The concept of "deference" was extended to questions of Church government or polity as well as to issues of religious faith or doctrine by this Court in its decision in *Jones v. Wolf*, 443 U.S. at 602, and *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. at 709-710.

Here the Court of Appeals pays lip service to the rule of "deference" by acknowledging that it may not grant a declaratory judgment of independence to the First Church and yet, accomplishes the same effect by issuing a permanent injunction in favor of said ecclesiastical body. Such action we submit, effectively neutralizes any higher judicatory from further review of the questions of polity and governance permitted by *Kedroff*, *Jones*, and *Serbian*. As noted by Presiding Justice Mahoney, of the Appellate Division, Third Department, in his

concurring opinion for modification of the decision *nisi prius* (A-31):

> civil courts *must*, therefore, be bound by the ecclesiastical determination made within the governmental framework of the general church that the local 'session' is not wisely managing its own affairs. That being the case, civil courts may then read the constitution in a secular manner which will not offend any constitutional principles.

The Court of Appeals turns a blind eye to the ecclesiastical necessity and right for such review by holding to the illusory question of *title* to real property. Here church rule is stymied for no Presbyterian judicatory can effectively rule on the future governance and thus *use* of the First Church property. The schismatic act of the session of First Church is therefore confirmed, contrary to established law.

Such decision of the Court of Appeals of the State of New York denies United Presbyterian Church and the Presbytery of Albany, petitioners herein, the free exercise of religion guaranteed by the First Amendment and further, does not provide the United Presbyterian Church the equal protection of laws mandated by this Court in its earlier holdings and the Fourteenth Amendment.

The issues involved herein are critical not only to petitioner United Presbyterian Church but for all other hierarchical churches in the United States.

CONCLUSION

For all the reasons set forth above, *amicus curiae*, William C. Brownson respectfully requests this Court to entertain the petition of United Presbyterian Church et al. for a writ of certiorari and to reverse the decision below.

Respectfully submitted,

MICHAEL I. SMITH
1730 "K" Street N.W.
Washington, D.C. 20006

Of Counsel
FREEDMAN LEVY KROLL & SIMONDS

WILLIAM J. O'SHEA
598 Madison Avenue
New York, New York 10022
Attorney for Amicus Curiae